No. 19,793

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WESTERN LIGHTING CORP., a corporation,

Appellant,

vs.

SMOOT-HOLMAN COMPANY, a corporation,

Appellee.

PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

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To the Judges of the United States Court of Appeals for the Ninth Circuit:

Western Lighting Corp., a corporation, petitions the above-entitled court for a rehearing after decision affirming the order of the United States District Court, which held Western Lighting Corp., in contempt and assessed a fine of $500 and a further sum of $250 in attorneys' fees.

I.

Title to the Merchandise Passed to the Buyer on August 13, 1964.

Smoot-Holman claims that an injunction, effective August 13, 1964, was violated on September 10, 1964. On that date Western delivered lighting fixtures to the Madison & Arroyo School in Pomona, California, on order of Valley Wholesale Electric Co. The trial court had to determine only one factual problem: Did title to the electrical fixtures pass to the buyer before August 13, 1964? If title passed before that date, Western was not in contempt.

The trial court impliedly held that title had passed on the date of delivery, September 10, 1964. Because

appellant believed this finding had no support by reasonable inference from uncontradicted evidence. An appeal was taken. This court affirmed and provided reasoning in its opinion which we believed ignored the facts, common sense inferences, and the law of sales.

Valley issued its purchase order to Western on May 1, 1964, for certain described lighting fixtures. The order was accepted by Western and was set aside and stored for future delivery to Valley. There is no question but that the merchandise was in existence at that time and there is no reason to disbelieve it was not warehoused at that time. On that date Western became obligated to sell and Valley obligated to buy. Usually it is inferred that parties to a sale of goods intend that title should pass to these goods on the date of contract. This is especially true if the goods are set aside for delivery to the buyer (§1739 California Civil Code, Rule 1). This rule may be qualified if the seller is obligated to deliver to a specified location (§1739 California Civil Code, Rule 5). But the intent of the parties as to the time when title shall pass, always controls (§1738 California Civil Code).[1]

The Valley purchase order is supplemented by two documents issued and executed by the seller Western [bill of lading, Ex. D, and a shipping order, Ex. E]. These bear the date August 10, 1964. There is some suggestion in the opinion that these documents might

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[1]The opinion makes much of language on the purchase order [Ex. E] which was blocked out on the xerox copy attached to the affidavit of Moses: "Released for delivery 8/26/64 not B4" and below a line the words "per Skip 7/24". It is obvious from this that on 7/24 one named Skip wrote on the document that the goods were not to be released from the warehouse before (B4) 8/26/64. The effective date of the injunction was August 13, 1964. The affidavit admitted that delivery was made on September 10, 1964. If date of delivery determines the problem, the notation on the document is immaterial. The purchase order does describe place of delivery. This was not blocked out. This is the only notation which is material to a finding as to intent of the parties. (See §1739 California Civil Code, Rule 5.)

not have been executed on the date which they bear. This inference is opposed by a stronger inference that Western wished to pass title to these goods, which were the subject of the May sale, before the effective date of the injunction, August 13, 1964.

Western had to pass title before August 13, 1964, in order to fulfill its May 1964 contract. Necessity dictated the execution of documents which would pass title irrespective of delivery date of the goods. There is no need to indulge in esoteric interpretation of documents in order to arrive at conclusion dictated by the situation itself.

II.
A Footnote in the Opinion Which Reflect Upon the Integrity of Counsel.

One Footnote in the opinion is of particular concern to counsel rather than to the client.

Footnote 3 is particularly critical of counsel.[2] The lower court made no inquiry into the circumstances under which the affidavit had been prepared or the xerox copy prepared. Judge Curtis of the District Court did not censure counsel or institute an inquiry. The originals were brought to court and produced before any evidence was taken. But this court infers some intent to deceive from the frank statement of Jamieson ". . . that he had told Moses that it was all right to cover the prices, and that he, not Moses, prepared the affidavit". Footnote 3 further says: "As we have seen, much more than 'prices' was covered." This infers that Jamieson directed that something more than "prices" was to be omitted from the Xerox copy.

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[2]"[3]When the apparent covering of parts of the papers 'copied' and attached to Moses' affidavit was called to the court's attention, appellant's counsel announced that he had told Moses that it was all right to cover the prices, and that he, not Moses, prepared the affidavit. As we have seen, much more than 'prices' was covered. . . ."

It so happens that this indirect criticism of Hamer Jamieson, is not justified. An affidavit is attached as an appendix to this petition which states some of the facts. Jamieson was called into this case on Monday, September 14, 1964. He had had no knowledge of the facts and had not tried the case. Jamieson assisted Walsh in preparation of the affidavit of Herbert Moses, president of Western Lighting Corp., on Wednesday, September 16, 1964. He did not direct the Xerox work nor did he see the affidavit after it was prepared.

At the oral argument on September 21, 1964, Jamieson had in his possession the originals which had been shown him by the client the week before. Counsel for Smoot-Holman called attention the the "obvious deletion". The originals were immediately produced and introduced into evidence. The court accepted these originals [Exs. C, D and E], and made no further comment or statement. The subject was never mentioned again in the District Court during the hearing. If prices alone were blocked out on Exhibit A, surely no one could criticize. But other writing was blocked out for which Jamieson has assumed no responsibility. He was as surprised as anyone in the courtroom when he discovered this fact.

This court has had occasion to reverse a District Court judge who precipitously criticized a lawyer without informing him of the charges against him or giving him a chance to prove facts in his defense (*In re Barry Yao Company, Quittner v. Harris* [1961], 286 F.2d 299). Any order which reflects on the integrity of a lawyer should have thorough investigation. It should be a guide to this court that Judge Curtis saw nothing in the conduct of counsel which deserved reprimand. If he had had a suspicion that counsel was attempting to deceive or mislead, he would have inquired into it and this court would have had a full opportunity to review facts of record, not suspicions from a record. (See also

In re L.A. County Pioneer Society [1954], 217 F.2d 190.) This court cannot try Jamieson on a record which did not produce the facts, nor can we argue the merits of his position on a petition for rehearing.

The court has ordered that the record of hearing be forwarded to the State Bar of California. But the policy of the State Bar of California is not to advertise complaints to the general public made against lawyers (Rule 8, Rules of Procedure, State Bar of California). If the order referring this matter to the State Bar of California is unpublished, no harm is done. But if the order referring the matter to the State Bar is published and is of public record, then great harm might be done to this lawyer's reputation. If footnote 3 is published in the permanent reports, counsel's reputation will be harmed. If later counsel is exonerated from any blame, the court could not delete an unfortunate and inaccurate statement from its publication.

We respectfully request this court to delete footnote 3 as unnecessary to the decision because of the grave risk of harm to counsel's reputation. We further request that the order referring the matter to the State Bar of California be placed in the confidential files of the Court of Appeals for the Ninth Circuit pending decision of the State Bar of California.

Appellant respectfully requests that this Petition for Rehearing be granted.

Respectfully submitted,

JOSEPH A. BALL, of
BALL, HUNT & HART,
HERZIG & WALSH,
Attorneys for Appellant.

December 9, 1965.

Certificate.

The undersigned counsel certifies that this petition is not interposed for delay and that in his judgment it is well founded.

JOSEPH A. BALL

APPENDIX TO PETITION FOR REHEARING.

Affidavit of Hamer H. Jamieson.

State of California, County of Los Angeles—ss.

Hamer H. Jamieson, being first duly sworn, deposes and says:

Since September 1964, I have done some work for the firm of Herzig and Walsh in patent cases which result in litigation. I am available to them on Monday, Wednesday and Friday of each week.

On Monday, September 14, 1964, I was handed an Order to Show Cause issued by the federal district court which cited Western Lighting Corporation for contempt. I was asked to appear in court on the following Monday and oppose the citation. I asked that Herbert Moses, President of Western Lighting Corporation, be advised to come to the office on Wednesday, September 16, for an interview, and to bring with him all documents pertaining to the transaction. On Wednesday, September 16, 1964, Edward Walsh, one of counsel, and I interviewed Herbert Moses. I had no previous knowledge of the facts, and had not tried the case. As Moses related the story of the transaction which was the subject of the contempt citation, I dictated an affidavit and Edward Walsh dictated my phrasing into a Stenorette. Moses handed me three documents which were later introduced into evidence and marked as Exhibits C, D and E. After reading the documents, I told Moses that copies of the documents should be attached to the affidavit and the originals should be offered at the time of the hearing. Moses objected, stating that he did not wish to disclose his prices. This seemed reasonable and I advised him that the price of the sale was not material to any issue on the Order to Show Cause at this time but the originals should be brought to court. A stenographer in the office advised us that she could make

xerox copies of the documents and cover up the prices with a piece of paper so that the machine would not reproduce the prices on the copies. Prices are always present in such documents and the absence of prices in the xerox copies would be obvious. If the prices ever became material, I planned to have the originals with me which could be disclosed to the court on request.

My time card shows that only two hours were spent on this matter. I did not personally supervise typing of the affidavit nor the preparation of the xerox copies which were attached. I did state to Moses that the prices could be deleted from the xerox copies because of the confidential nature of prices. I did not direct that any other writing be deleted from xerox copies and I did not know that the handwritten notation on the purchase order (Ex. E) had been deleted until I appeared in court. A temporary secretarial employee prepared the affidavit and xerox copies which were attached. I did not see the affidavit before it was served.

At the conference between Moses, Walsh and me, no one suggested that anything be blanked out except the prices. Any other omission was as much a surprise to me as to anyone in the courtroom.

At the oral argument in the federal district court on September 21, 1964, the attorney for the plaintiff called the court's attention to obvious deletion of the prices [pp. 978-979, R.T.]. I had the originals in the file. I immediately produced the original records, offered them as exhibits and offered Moses as a witness. Moses had not been subpoenaed but I had arranged that he be present at the time of the hearing.

This subject (of the deleted prices) was never mentioned again during the oral hearing before the district court, by counsel or by the Judge. It was not mentioned in the findings by the trial judge, nor was it

mentioned by the attorney for the plaintiff in his briefs or in oral argument before this court, nor by this court at the oral hearing.

I have never been asked to state the facts which led to the preparation of the affidavit and can only partially relate the entire details of the preparation of the affidavit at this time as I do not know them of my own knowledge. It was a surprise to me to read the decision and order of this court which questioned my good faith in the preparation of the affidavit. I request that before this court judges me, I be notified of a charge and be given the right to defend myself.

HAMER H. JAMIESON,

Subscribed and sworn to before me this 9th day of December, 1965.

FLORA E. WILSON
Notary Public, State of California Principal Office-Los Angeles County.